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Supreme Court of the United States

October Term 1951
No. 50

CANADIAN AVIATOR LTD.,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent,

and

H. JASON JONES, et al.,
Intervenors.

PETITIONER'S REPLY BRIEF ON PETITION FOR CERTIORARI

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Dated: New York, N. Y., June 25, 1951.

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I. As to the allowance of any interest.

Respondent's argument misses the point. Respondent asserts that there is but one liability, which is not determined until the entry of final decree. No doubt the liability remaining after the balance is struck is single but the question remains, Do the damage items of the parties upon which that balance is calculated bear interest from the dates of collision or payment until the balance is struck?

The issue is not whether pre-decree interest is allowed only to the party from whom a balance has been withheld. Respondent does not deny that the allowance of pre-decree interest in both-to-blame cases has been to *both* parties on the same basis. Petitioner claims it should be so allowed in this case—see petition, appendix A, p. 24.

It is entirely erroneous to say, as respondent does (brief, p. 11), that this Court's decision in *The Manitoba*, 122 U. S. 97,

> "simply holds that, in a limitation proceeding, the shipowner's liability is limited to the value of his vessel *plus interest from the date of the decree and not prior to the entry of that decree.*"

This statement is wholly wrong.

This Court squarely held that the shipowners' damages included pre-decree interest. Before reaching the question of whether the MANITOBA's limitation of liability fund must include interest the Court had to determine the amount of the MANITOBA's liability to the COMET. Mr. Justice Blatchford, an experienced admiralty judge,* carefully calculated the arithmetic and, for the Court, concluded

> "That [$39,174.08] was the amount of the liability of the Manitoba to the Comet, at the date of the decree of the Circuit Court, on a division of the damages, after a proper allowance to the Manitoba for the damage to her, and without reference to the limitation of liability" (p. 111).

That figure, $39,174.08, included pre-decree interest—for a simple statement of the figures see appendix A to the petition pages 24-5.

If pre-decree interest had not been allowed by this Court on the damage items of both shipowners the question as to interest on the MANITOBA's limitation fund (which respondent says is the only question decided by this Court) would never have been reached because the balance payable

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* Mr. Justice Blatchford had substantial experience as a District Judge in the trial of admiralty cases and doubtless well knew the law and the practice in the assessing of damages in both-to-blame cases. See his memorial, 150 U. S. 707,711.

by the MANITOBA to the COMET without interest was less than the MANITOBA's limitation fund without interest.*

Respondent asserts that

> "* * * the general rule [is] that where the damages are uncertain and in need of proof, interest may be allowed only from the date when they are liquidated * * *" (brief p. 11).

The Court of Appeals did not rest its decision on any such supposed rule. Moreover, there is no such rule and respondent's citations do not support it. *Kawasaki Zosensho* v. *Cosulich Societa Triestina Di Navigazione,* 11 F. 2d 836 (C. A. 5), certiorari denied 265 U. S. 581, *The Tremont,* 160 Fed. 1016 (W. D. Wash.) and *The Mary B. Curtis,* 250 Fed. 9 (C. A. 5), cited by respondent, brief pp. 10-11, held that the general rule is to allow interest from the date of the collision, or payment of the bills, but may be refused in sound discretion if unusual facts require it. The cases cited at pages 5-14 of the petition establish that the allowance of interest is the rule rather than the exception in admiralty although the damages are invariably uncertain and in need of proof.

Respondent's assertion that "interest in a common law tort action does not begin to run until date of judgment"

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* COMET's damages without interest	$57,441.88
MANITOBA's damages without interest	5,000.00
Difference	$52,441.88
One-half the difference—payable by MANITOBA to COMET	$26,220.94

Since the MANITOBA's limitation fund without interest was $28,694.95, an amount greater than the MANITOBA's liability to the COMET calculated without interest, no question of limitation of liability arose unless pre-decree interest was allowed in calculating the balance payable.

(brief, p. 7) has no support in any recent case in which the damages were, as here, ascertainable, e.g. shipyard repair bills. The common law in fact has now progressed to the point where it is more liberal than the admiralty, for it is now debated whether in such cases it is not error as matter of law to deny interest, while formerly it was only the rule that interest was discretionary. 61 Harv. L. Rev. 113, 136-138. See *Sedgwick on Damages*, 9th Edition, §§ 316-324; *Sutherland on Damages*, 4th Edition, § 355.

The Court of Appeals was not prompted toward its decision by any thought that to allow interest would penalize the defense of a law suit, a new point suggested by respondent (brief, pp. 12-13). The Court of Appeals rested its decision upon the thought that interest should not start until there has been a determination as to which party is withholding a balance from the other. Despite respondent's footnote 11 it has been clear from the beginning of this case that the eventual balance would be due to petitioner. Surveys of the damaged vessels showed within a week of the collision that petitioner's damages would be upwards of $70,000 whereas respondent's damages would be less than $20,000. Respondent likewise had means of knowing from the beginning that it was a case of mutual fault. It is apparent from the decisions of both the District Court and the Court of Appeals on the merits* that respondent's vessel was held at fault on the basis of her own admissions. Less than six months after this collision occurred we offered to settle this case on the basis of both-to-blame but respondent declined (R. 56-8).

Such considerations sustain the District Court's allowance of pre-decree interest to both parties when it entered the interlocutory decree after trial (R. 31, f. 93). Similar considerations doubtless prompted respondent not to appeal from the allowance of interest when it took its first appeal.

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* 1945 A. M. C. 348 and 154 F. 2d 825.

II. As to the rate of interest.

None of the cases cited by respondent deals with the Suits in Admiralty Act, with its specific interest authorization. More importantly, none deals with the question here, the right *of the United States* to interest at a rate in excess of that awarded to the private party.

Respondent's attempt (brief, p. 14, footnote 12) to belittle "a letter later written by Judge Manton" in *The Comus,* 1927 A. M. C. 1713, falls before the record. The United States Attorney and we were proctors for the adverse parties in *The Comus.* We have examined our file in that matter, as the United States Attorney may examine his file. The fact is that final interest was calculated by both parties at 6% per annum, that the balance was struck on that basis, and the amount actually paid and received in satisfaction of the final decree was determined on the basis of 6% interest to both parties. Thus the actual effective *decision* of the Court of Appeals in *The Comus* was to put the private vessel owner on an equal basis in the matter of interest by allowing 6% although the Suits in Admiralty Act limits the rate to 4%.

Conclusion

The decision below is wrong and there exists serious conflict between it and the prior decisions of this Court and the Courts of Appeal and the District Courts in the maritime circuits. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be granted.

EUGENE UNDERWOOD,
Proctor for Petitioner.

Dated: June 25, 1951.